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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1974

No. 74-1488

ROGERS C. B. MORTON,
Appellant,

vs.

STATE OF NEW MEXICO,
Appellee.

On Appeal from the United States District Court for the District of New Mexico

BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEE'S MOTION FOR DISMISSAL OR AFFIRMANCE

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INTEREST OF AMICUS

This brief *amicus curiae* on behalf of Pacific Legal Foundation (hereinafter PLF) is respectfully submitted pursuant to Supreme Court Rule 42, consent to the filing of this brief having been granted by counsel for appellant Secretary of the Interior (hereinafter Secretary) and by counsel for appellee State of

New Mexico (hereinafter New Mexico). PLF believes that for the reasons stated herein, this Court should affirm the judgment of the United States District Court for the District of New Mexico or, alternatively, dismiss the Secretary's appeal, pursuant to Supreme Court Rule 16.

PLF is a nonprofit corporation duly organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for PLF is set by a Board of Trustees composed of concerned citizens. Ten of the 18-member Board are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where PLF's position has broad public support within the general community.

PLF has members, supporters, and contributors whose lands are being severely damaged by overgrazing from wild and free-roaming horses and burros. PLF is gravely concerned about the damage occurring to the public lands from unregulated overpopulations of wild and free-roaming horses and burros, as well as the damage occurring to these animals themselves. By granting these animals blanket protection without regulation and management, severe overgrazing is occurring on both public and private lands where these unrestrained animals roam at will.

At the time the Wild and Free-roaming Horses and Burros Act, 85 Stat. 649-651, 16 U.S.C. § 1331-1340 (hereinafter Act), was enacted (1971), it was estimated that there were no more than 9500 wild horses

in existence. 2 U.S. Cong. & Admin. News, at 2150 (1971). However, the Secretary has admitted, in his report entitled "Effects of Livestock Grazing on Wildlife, Watershed, Recreation and Other Resource Values in Nevada," U.S. Department of Interior, Bureau of Land Management, February, 1975, (hereinafter Nevada Report), that horse populations are multiplying at the rate of 20 percent per year. *Id.* at 36. Thus, the Secretary is now able to claim that today—after four years of fruitful propagation—there are 20,000 to 25,000 wild horses in Nevada alone. *Id.* at 35-36. The havoc wild horses and burros are causing and will continue to wreak upon the western rangelands is disastrous.

Severe competition for forage and water exists between wild horses and burros on the one hand and domestic livestock and game species on the other. If permitted to continue unchecked, populations of wild horses and burros will destroy rangeland habitat for themselves, as well as for domestic and game animals. This destruction of habitat will cause widespread adverse economic consequences in the cattle industry and to the consumers of meat products. Numbers of livestock will be reduced, raising prices of meat products. Beef imports will have to be increased, aggravating our balance of payments problem and dependence on other countries. The high price of beef will force consumers to purchase substitute foods, not as rich in essential proteins.

The livestock industry is a basic part of the economic structure of the western states and its impor-

tance to this nation's stability—particularly during the present uncertain economic picture—cannot be overemphasized. The potential for severe national economic disruption through the multiplier effect is real and imminent.

More important than the economic issues, however, is the issue of the limitation of federal regulation to matters enumerated in the Constitution.

Because the Secretary has failed to show any constitutional basis for the Act, either in the district court or in his jurisdictional statement, his appeal is devoid of merit and should be dismissed and the judgment of the district court should be summarily affirmed.

OPINION BELOW

The three-judge United States District Court for the District of New Mexico (appearing in appellant's appendix) declared the Act to be unconstitutional. Specifically, the district court held that wild and free-roaming horses and burros were not property over which the federal government could exercise dominion and control under article 4, section 3, clause 2, of the United States Constitution; rather, that sovereign ownership was vested in the individual states. Additionally, the court held that since wild and free-roaming horses and burros are not migratory animals, Congress could not find a power to regulate such animals under the commerce clause of the United States Constitution.

ARGUMENT

I

THE CONSTITUTION GRANTS CONGRESS NO POWERS WHICH AUTHORIZE THE ACT

The basic issue in this case is whether Congress acted within the powers delegated to it under the Constitution in adopting the Wild Free-roaming Horses and Burros Act, 16 U.S.C.A. § 1331-1340 (hereinafter Act).

In *Afroyim v. Rusk,* 387 U.S. 253, 257 (1967), this Court delineated the limits of congressional power:

> "Our Constitution governs us and we must never forget that our Constitution limits the Government to those powers specifically granted or those that are necessary and proper to carry out the specifically granted ones. . . ."

Thus, in order for an act to be valid, it must be grounded on a specifically enumerated power. In the Act's statement of purpose, Congress neglected to identify the specific section of the Constitution relied upon, apparently preferring to emphasize emotional, rather than legal, aspects of the issue. This theme has been carried over into the Secretary's Jurisdictional Statement.

The Secretary contends (Jurisdictional Statement, at 9, n. 4) that the operative effect of holding the Act unconstitutional would be to make several cited federal wildlife statutes also unconstitutional. A brief reference to the cited statutes reveals that the Secretary's claim is without merit and fails to distinguish

the authority and manner of regulation of those statutes with the Act.

The National Wildlife Refuge System Act of 1966 (16 U.S.C. § 668dd-668ee) sets aside specific federal property as a habitat for wildlife. While hunting is prohibited within those areas unless allowed by law, Congress specifically recognized State authority:

> "[N]othing in this Act shall be construed to authorize the Secretary to control or regulate hunting or fishing of resident fish and wildlife on lands not within the system. The regulations permitting hunting and fishing of resident fish and wildlife within the System shall be, to the extent practicable, consistent with State fish and wildlife laws and regulations. *The provisions of this Act shall not be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate fish and resident wildlife under State law or regulations in any area within the System.*" 16 U.S.C. § 668dd(c). (Emphasis added.)

Several of the cited acts establish specific wildlife sanctuaries or prohibit hunting of specified animals within certain parts of the United States. 16 U.S.C. § 671-697(a); 16 U.S.C. § 26 and 98-99; and 16 U.S.C. § 41. However, unlike the Act, these statutes merely proscribe *activities* upon federal lands, much as any private landowner may regulate activities of others on his land.

The Fur Seal Act of 1966 (16 U.S.C. § 1151, *et seq.*) was enacted pursuant to a treaty—the Interim Convention on the Conservation of North Pacific Fur

Seals. 16 U.S.C. § 1159(a). Authority is also found under congressional power over foreign commerce since the seals are primarily taken in international waters and imported into the United States.

The Marine Mammal Protection Act of 1972 (16 U.S.C. § 1361 *et seq.*) contains specific findings that the animals sought to be protected move in interstate commerce or affect animals which also move in interstate commerce. 16 U.S.C. § 1361(5) (A) and (B). Congress further found that such protection is necessary to insure their continuing availability for commerce.

The Endangered Species Act (16 U.S.C. § 1531 *et seq.*) is specifically enacted pursuant to the treaty power. 16 U.S.C. § 1531(f). Additionally, there are numerous provisions therein which recognize the state's right to manage its wildlife and which often defer to the state. *See, e.g.,* 16 U.S.C. § 1533(d), 1535. It is also noted that the acquisition of land to provide suitable habitats for endangered species (16 U.S.C. § 1531(b) and 1534) and the power of the purse (16 U.S.C. § 1531(5)) were chosen as the primary means of achieving Congress's goals.

The Wild and Scenic Rivers Act (16 U.S.C. § 1271 *et seq.*) protects designated rivers as a complement to the national policy of constructing dams. 16 U.S.C. § 1271. Thus, there is authority under the Commerce Clause, since water control projects affect interstate commerce. Moreover, under this Act, the states, not the federal government, administer the program without expense to the federal government. 16 U.S.C. § 1273.

The Wild Free-roaming Horses and Burros Act, in contradistinction to the above statutes, purports to extend federal control over all wild horses and burros, not only on federal lands but even on private lands. 16 U.S.C.A. § 1334. Such animals are non-migratory in nature. Congress did not attempt to recognize any state authority over these animals, but rather assumed plenary power of regulation without citation to any applicable constitutional provision. Congress failed to cite any applicable treaty and failed to note any applicability of the Commerce Clause. Thus, contrary to the Secretary's fears, finding the Act to be unconstitutional because it is not grounded in an enumerated power will not affect the constitutionality of the cited statutes because those statutes are based on enumerated powers.

II

WILD AND FREE-ROAMING HORSES AND BURROS ARE NOT PROPERTY WITHIN THE PURVIEW OF ARTICLE IV, SECTION 3, OF THE CONSTITUTION

The Secretary takes the position that federal authority to control wild free-roaming horses and burros, wherever they may be found, is in part based on the Property Clause of Article IV, Section 3 of the Constitution:

> "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . "

This position ignores the language of the Act, 16 U.S.C.A. § 1334, which purports to control wild horses and burros which are not on federal land. This position also falters in making the bootstrap assumption that the animals are in the constitutional terminology, "other property belonging to the United States."

Property is simply that over which someone exercises dominion and control to the exclusion of others. Webster's New Instructional Dictionary of the English Language (2d ed. 1954). Wild animals (*ferae naturae*), however, have historically been viewed as the antithesis of property; they are "wild" because no dominion and control is exercised over them. Thus, "[w]ild birds [and presumably horses and burros] are not in the possession of anyone; and possession is the beginning of ownership." *Missouri v. Holland,* 252 U.S. 416, 434 (1919).

Thus, it is not surprising that the Secretary, in *New Mexico State Game Commission v. Udall,* 410 F.2d 1197, 1200 (10th Cir. 1969), *cert. denied* 396 U.S. 961, did "not assert that the United States has any ownership in wild animals within the various states." He did not because he could not.

Each state has plenary power to regulate wild animals within their boundaries subject only to the limitation that the federal government may take any action to protect public lands from such animals. *Camfield v. United States,* 167 U.S. 518 (1896); *Hunt v. United States,* 278 U.S. 96 (1923).

Regulation of wild animals is, in the absence of a treaty or other constitutionally authorized exception,

solely a function of the individual states, into whose charge such animals are entrusted for the benefit of all the people in common. This Court has noted:

> "'We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as proprietor but in its sovereign capacity, as the representative and for the benefit of all its people in common.'" *Geer v. State of Connecticut,* 161 U.S. 519, 529 (1895).

Cf. Ward v. Race Horse, 163 U.S. 504, 507 (1895); *LaCoste v. Dept. of Conservation,* 263 U.S. 545, 549 (1923).

Use of the term "ownership" in this sense is a legal fiction—*i.e.,* a term of art for the purpose of defining the fiduciary duty vested in each state to regulate wild animals for the benefit of all the people. *Toomer v. Witsell,* 334 U.S. 385, 402 (1947). It derives from common law whereby the power over such animals vested in the states as colonies and there resides to this day. *Geer v. State of Connecticut, supra* at 528.

Since the federal government has no property interest in wild animals, it necessarily follows that the district court properly found the Property Clause to be inapplicable.

III

THE COMMERCE CLAUSE DOES NOT EMPOWER CONGRESS TO REGULATE WILD HORSES AND BURROS

The Secretary's brief allusion to the Commerce Clause in his Jurisdictional Statement at 10 is wholly inadequate. Having failed to develop a minimal record in the district court, the Secretary is now attempting to present this Court with a belated record. Despite the Secretary's brief statements to the contrary, it is impossible to find within the Act a finding by Congress that it relied upon the Commerce Clause.

The avowed purpose of the Act is the protection of wild horses and burros, and the means chosen to accomplish this was to characterize such animals as an integral part of public lands. 16 U.S.C. § 1331. Not only is there no indication in the Act of any reliance upon the commerce powers, the district court noted that no evidence was presented to the court to support this theory. Memorandum opinion at 6. Indeed, the district court specifically held that "all the evidence established that the wild burros in question here do not migrate across state lines. Since Congress demonstrated no intent to utilize its commerce powers to regulate non-migratory wild animals, the district court correctly found the Secretary's reliance upon the Commerce Clause to be inappropriate.

CONCLUSION

The Secretary has failed to show any constitutional authority for the Act. Therefore, Pacific Legal Foundation, as *amicus curiae,* urges that the appeal be dismissed or that the decision of the district court be summarily affirmed.

August 12, 1975.

Respectfully submitted,

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